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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JON ELVIN, Plaintiff and Respondent, v. ARTHUR ELVIN, as Trustee, etc., Defendant and Appellant.	A100318 (San Francisco County Super. Ct. No. PTR-02-283003)

Plaintiff Jon Elvin brought this probate proceeding to challenge certain actions taken by his brother, defendant Arthur Elvin, both as trustee of a 1990 trust created by their mother, and as trustee of certain later trusts to which assets of the 1990 trust were conveyed. Arthur appeals from the trial court's order granting Jon's ex parte application to suspend the powers of the trustees of the subsequent trusts in order to preserve the assets at issue. Arthur contends that he did not receive adequate notice of the application, that Jon lacked standing to obtain the relief requested, and that the order was erroneous in various other respects. We conclude that Arthur has failed to show cognizable error in any of the matters complained of. Accordingly, we will affirm the order.

BACKGROUND

The verified petition, filed March 5, 2002, alleges that the settlor of all the affected trusts is Carol H. Elvin, who at the time of filing the petition was 88 years old, residing in a convalescent facility in Healdsburg, and "incapacitated, both physically and mentally, as a result of a stroke and other health problems." In 1990 she created the Carol H. Elvin

Trust, a standard revocable trust, into which she conveyed five specified parcels of real property situated in San Francisco. The trust instrument provided that all income and principal was to be available to her during her lifetime, and that upon her death the assets would be distributed in equal shares to her three sons Jon, Arthur, and David. Arthur was named as the first successor trustee and Jon was named as the second successor trustee. Apparently Carol and Arthur were both residing in San Francisco at that time.

In 1994, the petition continues, Carol "partially executed" four new trust instruments, each ostensibly creating an irrevocable "holding trust." In 1996 she executed a fifth such instrument. Arthur was apparently named as a trustee of each of these trusts, along with one Diane Kerrick, who was alleged to be unknown to Jon.[1] In 1997, Carol Elvin conveyed each of the five San Francisco properties into one of the holding trusts. In June 2001, when asked why she had done this, she told Jon, "I don't know why [Arthur] did that anyway." The petition asserts on information and belief that Arthur brought about these transactions "in order to give himself complete control of these properties upon CAROL's death." It further alleges, "ARTHUR has told family members that 'the trustees decide' who gets the properties at CAROL's death." It alleges on information and belief that the creation of the trusts was "the result of the undue influence of ARTHUR on CAROL, and/or . . . fraud, menace, and/or duress exerted by ARTHUR and/or at a time when CAROL lacked the requisite mental capacity to contract and to convey property."

In 2001, the petition alleges, Jon went to visit his mother in San Francisco, found her poorly cared for, and brought her to his Healdsburg home. Soon thereafter Jon discovered that the five San Francisco properties seemed neglected in numerous respects and were apparently yielding a total monthly income of $900.

In the petition Jon prayed for an order declaring invalid the five subsequent trusts

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[1] The petition alleges that Jon has been able to obtain a copy of only one of the subsequent trust instruments, but that he is informed by counsel for Arthur that they are all "essentially the same."

and the conveyances of property into them. Alternatively, he prayed for an order removing Arthur and Diane Kerrick as trustees of the subsequent trusts and appointing himself in their place. Jon also sought to be appointed successor trustee of the 1990 trust on the ground that his mother was medically incapable of managing its affairs and Arthur had shown himself to be incapable of managing trust assets. He also prayed for an accounting by Arthur and Diane Kerrick, and for an order that they pay a reasonable sum for waste and lost income suffered as a result of their mismanagement.

The petition was initially set for hearing on April 23, 2002. Notice was apparently given on March 18 by mailing to Arthur at a San Francisco address, to attorney John Hanlin as attorney for Arthur, and to Diane Kerrick care of the same attorney and at the apparent address of one of the subsequent trusts. Appearing specially as attorney for Arthur, John Hanlin filed a motion to quash the petition, ostensibly on behalf of Arthur, Diane Kerrick, and each of the five subsequent trusts.

The hearings on the petition and motion to quash were apparently continued from time to time until they were finally set for June 26, 2002. Meanwhile, on June 25, Jon Elvin filed an ex parte application to suspend the powers of the trustees of the holding trusts "for at least sixty days . . . to allow Petitioner and a representative of Carol H. Elvin time to investigate the relationships between the current trustees and the financial dealings of the trust and to report to the Court."[2] The application and supporting materials tended to show that one of the five properties had been transferred to one Skyhawk Properties, Inc., following which an amended deed had named one Minerva House, Inc., as a cotrustee in place of Diane Kerrick.

The court conducted two hearings on June 26, 2002. Appearing and participating

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[2] The application is only before us due to its inclusion in the *respondent's* appendix. Its omission from the appellant's appendix is a violation of rule 5.1(b)(1)(B) of the California Rules of Court, which requires that the appellant include any item, properly included in a clerk's transcript, which "is necessary for proper consideration of the issues, including . . . any item that the appellant should reasonably assume the respondent will rely on." Obviously this includes the moving papers which produced the order from which an appeal is taken.

in both hearings were counsel for Jon Elvin, Arthur Elvin, and Minerva House, Inc. In the first hearing, the court considered and took under submission the motion to quash service of the underlying petition. The court ultimately denied that motion. That ruling is now final.[3]

In a separate hearing later on June 26, the court considered the ex parte application to suspend the powers of the trustees. At the conclusion of that hearing the court made clear its intention to grant the application to suspend trustees' powers, albeit with certain limitations. The court subsequently entered a formal order suspending the powers of the trustees. This timely appeal followed.

DISCUSSION

Most of appellant's arguments are unsupported by authority. It goes without saying that our function does not extend to seeking out error which an appellant has failed to show. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [reviewing court will not develop appellant's argument for him].) " 'Counsel's duty to assist the court includes a duty to study and to discuss the available authorities . . . .' " (*People v. Taylor* (1974) 39 Cal.App.3d 495, 496, quoting *Tate v. Canonica* (1960) 180 Cal.App.2d 898, 900.) "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat [an] issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) Thus where a brief asserts a point without supporting authorities, the reviewing court " 'may treat it as waived, and pass it without consideration.' [Citation.]" (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

Accordingly, we will disregard appellant's arguments except to the extent that authority is offered in their support. Appellant's first contention, that the order

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[3] By order filed August 8, 2002, this court summarily denied Arthur Elvin's petition for a writ compelling the trial court to grant the motion to quash. (*Elvin v. Superior Court*, No. A099399.) The Supreme Court subsequently denied review, and the United States Supreme Court denied certiorari.

suspending the trustees' powers was a denial of due process, is supported only by three statutory references, none of which bears more than a tangential relationship to the surrounding argument. Thus appellant cites Probate Code sections 17200 through 17210, which contain numerous provisions governing petitions concerning internal trust affairs. We decline to scour these statutes in a search for some provision which might be offended by the order under review, particularly since we are immediately concerned not with the sufficiency of the *petition* but with the sufficiency of the ex parte application which produced the order challenged by this appeal. Probate Code sections 15802 and 15803 are likewise irrelevant to any issue presented by appellant; they deal only with the question of who is entitled to notice of a petition.

Slightly more germane is Probate Code section 15642, which specifically addresses petitions to remove a trustee. The underlying petition here is presumably subject to this statute, but again, the question before us is not whether the petition might be deficient in some respect, but whether the trial court violated appellant's due process rights by granting the ex parte application to suspend the powers of the trustees. The cited statute explicitly authorizes the court to make such an order as an ancillary provisional remedy in connection with a petition for removal. (Prob. Code, § 15642, subd. (e).) However it prescribes no particular notice requirements for such an order. Appellant urges us to hold that such relief can only be allowed upon noticed motion, and asserts that granting it ex parte "violates the spirit and letter" of the statute. This unsubstantiated statement does not afford a basis for depriving the trial court of the power to grant ex parte relief where sufficient cause is shown.

No other "due process" argument is accompanied by any authority whatsoever. We therefore pass the remainder of this section of the brief without discussion.

Appellant next asserts that Jon Elvin lacked standing to challenge the validity of the five subsequent trusts. The argument is entirely devoid of authority.[4] We therefore pass it without consideration.

Next appellant contends that the proper parties were not named *in the petition*. This argument embraces two distinct assertions: (1) that Arthur Elvin was not named in his representative capacity as trustee; and (2) that Minerva House, the apparent successor cotrustee, was not named at all. Neither point appears sound on the merits.[5] In any event appellant has again failed to provide any supporting authority.

Appellant next contends that there were no exigent circumstances or threat of

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[4] Aside from recitals of facts, the argument consists in its entirety of the following sentences: "The application should also have been denied on the grounds that Respondent did not have standing to bring the ex parte application as he is not a trustee or beneficiary of the TRUSTS. As a matter of fact and law, Respondent did not have any beneficial, legal or equitable interests, presently or in the future, in any of the real property. As a result, Respondent lacked standing to bring the ex parte application to suspend the powers of the trustees."

Respondent opposes the standing argument by contending, in essence, that he had standing to bring the *petition* as a successor trustee and remainder beneficiary of the original trust, and that once that trust and its trustees were brought within the jurisdiction of the court, he could invoke the court's supervisory power with respect to the subsequent trusts and *their* trustees. As so joined, the argument appears to raise a number of difficult substantive issues which we decline to address without the assistance of counsel for appellant, whose burden it is to demonstrate reversible error.

[5] Again the argument goes to the sufficiency of the *petition* without drawing any legal or logical connection to the sufficiency of the *order under review*. In any event, the capacity argument is unsound because it is plain from the face of the petition that Arthur Elvin is joined as a trustee. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 547 ["in order to determine the identity of a party courts are entitled to take into consideration the allegations of the complaint as well as the title"]; *Sealite, Inc. v. Finster* (1957) 149 Cal.App.2d 612, 617-618; *Hume v. Lacey* (1952) 112 Cal.App.2d 147, 149.) As for the failure to name the successor cotrustee, the papers supporting the ex parte application support a finding that Jon Elvin had only recently learned of that party's involvement in the matters at issue and had acted promptly and diligently in pertinent respects, including the giving of notice to that party, whose attorney appeared at the hearing and opposed the application on the merits.

immediate harm justifying ex parte relief. This is a challenge to the sufficiency of the evidence to support the trial court's presumed findings to the contrary. As such it fails entirely to comply with the settled principles governing such a challenge. An appellant who challenges the sufficiency of the evidence to support the judgment, or particular findings, assumes a "daunting burden." (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) "A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. (*Trailer Train Co. v. State Bd. of Equalization* (1986) 180 Cal.App.3d 565, 587-588.)" (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208, italics added.) Where a party presents only facts and inferences favorable to his or her position, "the contention that the findings are not supported by substantial evidence may be deemed waived." (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

Appellant presents only facts favorable to his position. Without discussing the evidence and inferences *supporting* the order under review, he summarizes a portion of "the declaration submitted in *opposition* to the [motion.]" He makes other factual assertions without citing, or even referring to, the actual contents of the record. He has failed to furnish any basis to set aside the challenged findings.

Principles we have already cited likewise compel rejection of appellant's contentions that the application should have been denied on grounds of "la[]ches," unclean hands, adequacy of legal remedy, and balancing of the equities. No authority is cited in support of any of these contentions. Nor is any attempt made to show that there was insufficient evidence to support the trial court's presumed findings in support of the order.

Appellant contends that the application was barred by the statute of limitations because the properties were transferred in 1997 and any action to set aside those transfers is governed by the four-year period set forth in Code of Civil Procedure section 343. Appellant seems to assert that respondent had constructive notice of the transfers because they were recorded. No authority is offered for the implicit premise that record notice of

a property transfer in breach of trust commences the running of the statute of limitations so that trust beneficiaries are barred from relief four years after the transfer occurs. In the absence of authority for this unlikely proposition, we reject the argument which rests on it.

Finally appellant contends that the application should have been denied "on the grounds that Respondent does not have a substantial probability of prevailing in this action." No authority is offered for the necessary premise that this was a relevant, indeed dispositive factor in the trial court. It seems to us likely that the court was entitled to freeze the status quo with respect to the trust res while the merits of the underlying petition were determined. In any event appellant does not make a convincing showing that the petition is likely to fail. His argument repeatedly alludes to the actions of Carol Elvin as a bar to relief, but there was substantial basis for the trial court to conclude that Carol Elvin's actions (and inactions) might well prove to be voidable due to lack of capacity, undue influence, or other vitiating cause. Again appellant fails to marshal the relevant evidence before the court and show how and why it was insufficient to support the presumed findings he now attacks.

DISPOSITION

The order appealed from is affirmed. Respondent Jon Elvin shall recover his costs on appeal.

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Sepulveda, J.

We concur:

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Kay, P.J.

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Rivera, J.